BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

JURISDICTION

The matters herein involved are the construction of a criminal statute and of a directive and of the conduct of a trial judge. Jurisdiction is invoked under U. S. Code Title 28, Section 347 (a) and Supreme Court Rule, Number 38, Paragraph 5(b).

STATEMENT

The Shreveport Engraving Company was charged in an information filed in the U. S. District Court for the Western District of Louisiana—with violating Conservation Order No. m-9-c, which order among other things, limited the use of copper and copper products in photo engraving as follows:

> "(a) In the last quarter of 1942, to 70% of the total usage in the last quarter of 1940."
>
> "(b) In each subsequent quarter—to 60% of the total usage in the corresponding quarter of 1940."

This directive was signed "J. S. Knowlson, Director of Industry Operations."

An amendment directive was signed "Ernest Kanzler, Director General for Operations."

These orders speak for themselves and show no other authority than as above shown in their published form in

the Federal Register, of which the Court takes judicial notice.

In the amended directive the right of appeal was given to those denied the use of copper above the quotas above shown.

The Engraving Company sought through every source provided by the War Production Board for permission and contended that permission had been orally granted to use copper in excess of above quotas.

In the amended m-9-c, Section (h) (2) the power to grant relief is specifically given and the Section reads in part—"Relief granted pursuant to an appeal under this order shall remain in effect despite any amendmeent to this order, unless the relief is specifically revoked or modified by the Director General for Operations."

Since the order was promulgated by this Director General for Operations over his signature the arbitrary power given to himself is evident.

When defendant attempted to show the arbitrary use of power in the Copper division of the War Production Board, the trial judge sustained an objection made by the government to this evidence. R. 71.

The evidence showed that the Engraving Company had more than enough copper on hand January 1, 1942, to cover the use of copper during the two quarters named in the Information. R. 380.

Also that the Photo-engravers polished sheets cost 49c per pound, R. 360, 366.

When turned into "scrap" the owners received 5c to 8c per pound. R. 392-5.

Conservation order No. m-9-b requires "scrap" to be delivered to a scrap dealer or a person authorized by the "Director General of Operations" and requires a report on all "scrap" accumulated above 500 pounds per month and delivery after 30 days to a scrap dealer of all scrap aggregating a ton; the "Information" shows accumulation by the Engraving Company of greater amounts during each quarterly period. R. 7, 8.

The record disclosed the attitude taken by the trial judge throughout the trial as hostile to the accused.

THE STATUTE INVOLVED

Second War Powers Act Sec. (2) (a) (2):

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense." (a) (2).

ASSIGNMENT OF ERRORS

I

The Court erred in holding that allocation includes freezing copper in the hands of the owner and thus withholding it from defense uses.

II

The Court erred in holding that the President could assign his authority, to make rules, to the chairman of the

War Production Board, who in turn could redelegate the power to a mere employee.

III

The Court erred in holding such employee could over his own signature issue directives, the violation of which would incur penalties.

IV

The Court erred in holding that there was a fair trial, when the trial judge repeatedly showed hostility to the accused and its witnesses and made evidentiary statements, in the presence of the jury, contrary to the evidence and harmful to the accused.

ARGUMENT

The cited statute, Sec. (2) (a) 5, provided punishment for "willful" violation of the act; or "any rule, regulation or order thereunder."

The government must concede that rule, order or regulation must be within the authority of the statute.

Petitioner relies on the words of the statute which authorize allocation by the President of material for defense, and since the evidence shows that the copper used by petitioner was not allocated for defense but on the contrary was not available for defense purposes until used and converted into "scrap," that no rule of any agent, officer or agency, or even of the President could make use of the copper sheets which did not destroy the copper or impair it so as to make it unfit for defense purposes, and only diminishes it in quantity by a very small percent, could subject petitioner to a criminal charge.

The government's witness, Palmer, the Deputy Director of Printing and Publishing of the War Production

Board during most of the time named in the Information, testified as to copper used in photo engraving:

"As a matter of fact, the turnover is the highest that we know of in any particular industry, because you do not actually consume it. Eventually it finds its way back to the scrap pile." R. 272-3.

It is thus made clear that the "freezing" of the copper sheets in their original form in the hands of the owner would defeat defense purposes, whereas the photo engravers use of copper, and subsequent scrapping advances defense purposes.

"The decisions of the Treasury Department applying these regulations have no more force than the reasons given to sustain them"—the Court said, p. 21—In Burnett v. Chicago Portrait Co. 285 U. S. 1.

Here the action being beyond reason, no attempt has been made to give reasons. The action of the employees of the War Production Board has been "one of unfettered discretion," a condition denounced as illegal by this Court in Panama Refining Co. v. Ryan 293 U. S. 388, 431.

In United States vs. Baltimore & Ohio Railroad 293 U. S. 454, 464. This complete absence of the basic or essential findings required to support the Commissioner's order renders it void."

In Manhattan General Equipment Company v. Commissioner of Internal Revenue 297 U. S. 129, 134, "And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable." Here it is neither.

Almost made for this case is the expression of the Court in Thompson v. Consolidated Gas Utilities Corporation 300 U. S. 55, when on pages 69-70, the Court said, "But obviously the proration orders would not be valid if shown to bear no reasonable relation either to the prevention of waste or the protection of correlative rights, or if shown to be otherewise arbitrary."

In considering a departmental regulation this Court said in Haggar Co. v. Helvering, 308 U. S. 389, on page 398, "as we have said the construction files in the face of the purposes of the statute and the plain meaning of its words."

This Court has been so consistent in denouncing arbitrary action, that it held in United States vs. Carolene Products Co. 304 U. S. 144, on pages 153-4. "Similarly we recognize that the constitutionality, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason." This was spoken not of a mere regulation, order, directive, or whatever it might be called originating in an Executive Agency, but of a Congressional Act.

In the very late case of Addison v. Holly Hill Fruit Products—No. 217 October term 1943, decided June 5, 1944, by the Supreme Court we find in the Text under headnote 2; "But when Congress wants to give wide discretion it uses broad language" and under headnote 5: "But it is no warrant for extending a statute that it should have been made more comprehensive."

We submit that the provisions of the directive under which the counts of the Information were drawn are, as applied to copper not allocated to defense purposes, unreasonable and arbitrary.

THE TRIAL JUDGE

The leading case on the right of comment by the trial judge is Quercia vs. United States 289 U. S. 466, decided by Chief Justice Hughes, who in reversing a conviction took occasion to chart the bounds of fair comments and laid down rules for trial judges, most of which were ignored by the magistrate who presided in this case.
The Supreme Court said, p. 470.

"His discretion is not arbitrary and uncontrolled but judicial, to be exercised in conformity with the standard governing the judicial office."

In this case the Trial Judge thus interrupted the cross-examination of P. E. Dozier, the President of the defendant company and its personal representative on trial, in this manner:

"Your business has been engraving for years—the business you ran? You knew there was a war going on didn't you?"

Witness: "My business is engraving, your honor."

The Court: "Did you know there was a war going on?" No standard governing the judicial office was followed there. R. 204.

The Supreme Court continued—"In commenting upon the testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not distort or add to it."

The trial judge below said: "Wait a minute, M-9-C, of course is equivalent of being a proclaimed law and a person engaged in the business of engraving copper, using

copper, and as the record shows, hundreds of thousands of dollars worth a year, he knows what M-9-C is, or otherwise he should not be in the engraving business or be an American Corporation. That is point No. 1, it strikes me."—R. 67.

The government offered evidence of the use of copper by the defendant. Government's exhibit 2, R. 353 and 354, showing a total of less than 13,000 pounds in the year in which the largest amount of copper was used which at 49 cents per pound, R. 199,255,256 would not equal seven thousand dollars "worth a year."

As a violation of the rule laid down by the Supreme Court, the trial court's words convict him.

The Supreme Court further said—"He may not charge the jury, upon a supposed or conjectural state of facts of which no evidence has beeeen offered."

Without any reason disclosed by the evidence, the Court said; "This is a sub rosa defense here." R. 216.

Again the Supreme Court said: "It is important that hostile comment of the judge should not render vain the privilege of the accused to testify, in his own behalf."

It will be noted that the remarks of the judge were made when the President of the Company, its physical representative in the trial was testifying.

As to the prejudicial language not herein quoted, we refer the Court to page 38 of the Record and to R. 166-68, wherein the Court gave expression to language that tenders to make the jurors believe that acquitting the defendant would be verging on an unpatriotic act.

We conclude with this quotation from the Quercia case made from the same page 470, as the others.

"The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should not be so given as to mislead and especially that it should not be one-sided.' That deductions and theories not warranted by the evidence should be studiously avoided."

We here call attention to the fact that defendant's president throughout contended that he was in good faith in believing he could use the excess of copper until July 1, 1943, without incurring the Board's penalties. R. 216, 217, 218.

It is respectfully submitted that the petition for a Writ of Certiorari be granted and that the Supreme Court of the United States should, should, after hearing, reverse the judgment of the United States Circuit Court of Appeals for the Fifth Circuit and dismiss the bill of Information filed below.

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